Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1507

SHERRON BASEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

		Page
Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit		1
Opinion Below		2
Jurisdiction		2
Questions Presented		2
Statutory Provisions Involved		3
Statement of the Case		4
Reasons for Granting the Writ		8
I	The Court of Appeals' reliance on Glasser v. United States was misplaced, for the standard of appellate reivew has been made stricter by this Court's decision in Jackson v. Virginia	8
II	The failure to show that a business record entry was made by a "person with knowlege" prevents the introduction into evidence of the content of that entry	9
III	Under the circumstances of this case, the due process clause prevents reliance on a presumption of continued membership in a conspiracy by all persons shown to have joined that conspiracy	11
Conclusion		12
Index to Appendixes		
Appendixes A & B		

TABLE OF AUTHORITIES CITED

Cases	Page
Glasser v. United States, 315 U.S. 60 (1942)	2, 8, 9
In re Winship, 397 U.S. 358 (1970)	12
Jackson v. Virginia, ... U.S. ....., 99 S. Ct. 2781 (1979)	2, 9
Mullaney v. Wilbur, 421 U.S. 684 (1975)	12
Sandstrom v. Montana, ... U.S. ....., 99 S. Ct 2450 (1979)	3, 11, 12

Statute

28 U.S.C. 1254(1)	3

Federal Rules of Evidence

Rule 104	10, 11
Rule 803(6)	2, 3, 4, 10
Rule 805	11

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Sherron Basey respectfully prays that a writ of certiorari issue to review the judgment and opinion of

the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 17, 1979.

OPINION BELOW

The unreported opinion of the Court of Appeals appears in the appendix to this petition (Appendix "A"), as does the order denying petitioner's petition for rehearing *en banc* (Appendix "B"). No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 17, 1979 (Appendix "A"). A timely petition for rehearing *en banc* was denied on March 10, 1980 (Appendix "B"), and this petition for a writ of certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. **Does this Court's decision in *Jackson v. Virginia* alter the standard of appellate review in federal criminal cases set forth in *Glasser v. United States*?**

2. **Does the government's failure to show that a business record entry was made by a "person with knowledge" prevent its reliance on Fed. R. Evid. 803(6) to prove the facts set forth in that entry?**

3. **Where there is no evidence of a defendant's continued membership in a conspiracy at the time of a given substantive offense, does the government's reliance on a presumption of continued membership violate due process within the meaning of *Sandstrom v. Montana*?**

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Federal Rules of Evidence:

Rule 806. Hearsay Exceptions; Availability of Declarant Immaterial

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

"(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling

of every kind, whether or not conducted for profit."

STATEMENT OF THE CASE

In September, 1976, Fitzgerald Collins Williams spoke with Timothy Henderson about the possibility of obtaining narcotics (25)[1]. Henderson said that he had a connection in Los Angeles and they discussed the possibility of Williams coming to Los Angeles to obtain drugs (26). Williams mentioned the fact that he might have a source of heroin in Los Angeles to John Bruno, an undercover narcotics officer (23). Bruno said that he wanted to buy some heroin and asked Williams to try and get some for him (22).

In mid-November, Henderson said that he had made a connection and that Williams could come out to buy heroin (27). Williams flew to Los Angeles on November 2, 1976 and was met at the airport by Henderson and Pat St. James (29). Two days later, Williams and Henderson went to a shopping center where they were met by Sherron Basey (30-32). She spoke to Henderson and then got into a blue car and drove away. Henderson returned to the car in which Williams was waiting and said that Sherron had gone to get a sample and would be right back (36).

Basey returned about forty-five minutes later. Henderson walked over to her car and then beckoned to Williams to join them. Williams and Henderson got into the back seat of the car (37-38). Williams told Basey that his people in New York wanted a connection for heroin. Basey said

[1]All page references are to the Reporter's Transcript of Proceedings.

that she could supply it and gave Williams a small sample of a brown substance (39). She said that she could get as much as he wanted for one thousand dollars an ounce, and that the sample was free (40-41).

The following day, Henderson came to Williams' hotel room. Williams gave him ten thousand dollars in a brown paper bag, and Henderson left. He said that he was going to meet Sherron to get the package (44). Sometime later, Henderson returned with a brown paper bag that contained smaller bags inside. The smaller bags contained a brown substance (46). Williams put the brown paper bag into his suitcase (45).

After packing his suitcase, Williams, Basey, Henderson and St. James got into Basey's car and went to a restaurant. There, Henderson "toasted" the success of their adventure (49). Before they separated, Basey gave Williams a telephone number at which he could reach her (52).

After Basey had gone, Williams took some of the brown substance that he had obtained from Henderson and mixed it with the sample that he had obtained from Basey (50). Williams then put the substances away and went to the airport to return to New York (53).

The next day, Williams delivered the package that he had obtained from Henderson and then met with Bruno and gave him the sample containing both the substance obtained from Basey and a portion of the substance obtained from Henderson (54 - 55, 213; Exhibit 1). He also gave Bruno the telephone number that Basey had given to him (65)[2].

[2]That number was a "wrong number." Neither Bruno nor Williams was able to contact Basey by telephoning it. (57, 215.)

Williams returned to Los Angeles to purchase drugs again on December 16th (65). He told Henderson that he wanted to get right back to New York and asked if there would be any trouble getting the package. Henderson said that he would call Sherron and made a telephone call. He then said that she was not there but that she would call back as soon as she returned (61).

An hour later the telephone rang. Pat St. James answered and said "Sherron." Henderson then spoke on the telephone. He hung up and said he was ready to leave. Williams gave Henderson ten thousand five hundred dollars before he left (61 - 62).

Henderson returned later that evening with ten small plastic bags of "heroin" (*sic*–it does not appear that the trial court had ruled that Williams was able to identify heroin–see 63 *et seq.*), and Williams put them into his suitcase (63, 67). The substance in the bags was grainy, and similar to the substance that Williams was to sell to Bruno later (65). He paid $1,000 per bag (67).

Williams returned to New York with his purchase and delivered the package (68 - 69). He then called Henderson and told him that everything was all right and that the people in New York liked the stuff (69).

After Christmas, Williams asked Henderson if he was ready to come to New York with the stuff for Bruno. Henderson said that he would find out if he could get the drugs on consignment (69). In early January, Henderson called Williams and said that the people in Los Angeles would not trust him with the drugs. Williams said that he tried to get his people to sponsor one more trip (70).

Williams then met with his backer. The backer was

hesitant, but Williams convinced him to sponsor another trip. On January 3, 1977, the backer gave Williams ten thousand dollars in a brown paper bag and drove him to the airport (71).

When Williams arrived in Los Angeles, he reached Henderson by phone and was told to take a cab to Henderson's house (73). The next day, Henderson made several phone calls and then told Williams that he would be able to return to New York that night. He said that Sherron was going to come by and pick him up (74).

Later in the evening, the intercom in the apartment rang and Pat St. James answered it. She asked who it was and was told "Sherron." Henderson then spoke into the intercom, said that he would be right down, and left the apartment. Before Henderson left, Williams gave him nine thousand five hundred dollars (75).

Hours later, Henderson returned without the drugs. He said that he could not get them and that Williams would have to return to New York without them (75). Williams did so, leaving the money with Henderson. Henderson was to call when he got the stuff and Williams would return to Los Angeles for delivery (76).

The following week end, Williams returned to Los Angeles. He took a cab to Henderson's house and Henderson showed him a package. Williams was disappointed with the package, but took it anyway. The next day he took it to New York and delivered it to a friend who said that it was all right (79, 81). The package smelled like the others (80).

In mid-February, Henderson called and said that he was going to come to New York the following day (83).

Williams met him at the airport and called Bruno to tell him that Henderson had arrived. Williams and Henderson then met with Bruno at a club in Brooklyn (85 - 86). When Bruno complained about Sherron's not wanting to call him, Henderson said that it did not make any difference "because Sherron's connection is now my connection" (281). He said that they would not have to go through Sherron any more, that he could deal directly with her connection (86, 141).

After completing their transaction, Bruno and Henderson talked about future deals. Henderson said that there would be no problem at all in obtaining large quantities of heroin for Bruno (285). Williams and Henderson then left and returned to Williams' house. Henderson made a return reservation to Los Angeles and flew back that evening (87).

On March 9, 1977, Henderson told Bruno that he was bringing a half kilo to New York and that Bruno could return to Los Angeles with him to buy an additional one and one-half kilos (294). Bruno and detective Palmeiri went to the airport and met Henderson. They drove back to Manhattan from the airport and, when Henderson delivered the heroin to them, they arrested him (294 - 296).

REASONS FOR GRANTING THE WRIT

I

The Court Of Appeals' Reliance On *Glasser v. United States* Was Misplaced, For The Standard Of Appellate Review Has Been Made Stricter By

This Court's Decision In *Jackson v. Virginia*.

By way of introduction to its discussion of Sherron Basey's challenge to the sufficiency of the evidence presented against her, the Court of Appeals cited *Glasser v. United States*, 315 U.S. 60, 80 (1942), for the proposition that "the standard we must apply is whether there is substantial evidence, taken in the light most favorable to the government, supporting the convictions" (Appendix p. 3). The *Glasser* standard, however, does not survive this Court's recent decision in *Jackson v. Virginia*, ... U.S. ....., 99 S. Ct. 2781, 2789 (1979). There, the Court set forth a stricter standard of review. The question to be answered by the reviewing court ruling on a challenge to the sufficiency of the evidence presented in a criminal case is:

> "Whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Since the Court's decision in *Jackson*, the standard is not whether there is "substantial evidence" but "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia, supra*, 99 S. Ct. at 2789. The *Jackson* standard should have been applied to Sherron Basey's challenge to the sufficiency of the evidence here, and the Court of Appeals' failure to do so was error.

II

The Failure To Show That A Business Record Entry Was Made By A "Person With Knowledge"

Prevents The Introduction Into Evidence Of The Content Of That Entry.

The government relied in part on evidence of telephone calls involving a telephone at 5415 Bedford Avenue, the location where Sherron Basey allegedly lived, to show her membership in the charged conspiracy. The only proof that Sherron Basey lived at 5415 Bedford Avenue, however, was the business records of the California State University at Northridge (Exhibits 49 through 52). Those business records were inadmissible, for the government failed to show the foundational facts required by Fed. R. Evid. 803(6).

Rule 104 of the Federal Rules of Evidence places upon the proponent of an item of evidence the burden of showing the foundation for its admissiblity. Thus, in order to support the admissibility of Exhibits 49 through 52, the government had to show that those exhibits were prepared by a "person with knowledge" of their accuracy. Fed. R. Evid. 803(6).

In failing to find error in the admission of the college records, the Court of Appeals stated that "the 'person with knowledge' required by the rule would, of course, be Basey herself. No double hearsay problem arises, therefore, as admissions and adoptive admissions are not hearsay under Fed. R. Evid. 801(d)(2)" (Appendix p. 5 n. 1).

The statement of the Court of Appeals fails to consider the failure of the government to show that it was Sherron Basey who supplied the information set forth in the college's business records. No person from the college appeared to testify that it was Basey who stated that her address was

5415 Bedford Avenue, and the government thus failed to meet the burden imposed upon it by Fed. R. Evid. 104.

The Court of Appeals' statement that the "person with knowledge" was Basey was no more than speculation. No evidence was presented that the college employee making the entries in question relied upon any statement by Sherron Basey. Absent such evidence, of course, the business records are multiple hearsay within the meaning of Fed. R. Evid. 805 and, thus, inadmissible.

III

Under The Circumstances Of This Case, The Due Process Clause Prevents Reliance On A Presumption Of Continued Membership In A Conspiracy By All Persons Shown To Have Joined That Conspiracy.

According to the Court of Appeals, once Basey's membership in the conspiracy was shown, "[h]er participation in the conspiracy is presumed to continue until the last overt act of the conspirators unless she produces affirmative evidence of withdrawal" (Appendix pp. 5 and 6). Thus, in spite of evidence that Basey had been by-passed as a source of drugs, she was found guilty of the substantive offense which took place in March of 1977.

As recently as last June, this Court considered the right of criminal defendants to have the government prove every element of the offenses charged against them beyond a reasonable doubt. *Sandstrom v. Montana,* ..... U.S. ....., 99 S. Ct. 2450 (1979). In *Sandstrom* the Court,

relying on *In re Winship,* 397 U.S. 358 (1970), and *Mullaney v. Wilbur,* 421 U.S. 684 (1975), held that a jury instruction which appeared to relieve the prosecution of proving an element of the charged offense beyond a reasonable doubt deprived a defendant of due process. Here, as in *Sandstrom* and *Mullaney,* the government was relieved of the burden of proving an element of the offense–Sherron Basey's participation in the conspiracy in March, 1977–beyond a reasonable doubt. Here, as in *Sandstrom* and *Mullaney,* the government relied upon a presumption to avoid proof of the elements of the offense beyond a reasonable doubt. Here, as in those cases, the removal of a portion of the government's burden of proof deprived the defendant of due process of law. The government did not prove–and could not have proven–that Sherron Basey was a member of the charged conspiracy at the time of the March, 1977, transaction, and she should not therefore have been convicted of the March distribution of heroin.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BURTON MARKS

Counsel for Petitioner

INDEX TO APPENDIXES

		Page
"A"	Opinion of the United States Court of Appeals for the Ninth Circuit filed December 17, 1979	1
"B"	Order of the United States Court of Appeals for the Ninth Circuit filed March 10, 1980, denying petition for rehearing and rejecting suggestion for rehearing en banc	9

APPENDIX "A..

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

SHERRON BASEY, Defendant-Appellant,
No. 78-1191;
J. C. RAMSEY, Defendant-Appellant,
No. 78-1203.

[Filed December 17, 1979]

Appeal from the United States District Court
for the Central District of California.

Before: ELY and TRASK, Circuit Judges, and
EAST,* District Judge

TRASK, Circuit Judge:

Basey and Ramsey appeal their convictions in the United States District Court of conspiring to possess heroin with intent to distribute in violation of 21 U.S.C. § 846 (Count I) and of distributing and possessing with intent to distribute one-half kilogram of heroin on or about March 9, 1977, in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841 (b)(1)(B) (Count II). The case was

*Honorable William G. East, United States Senior District Judge, District of Oregon, sitting by designation.

tried to the court sitting without a jury and each defendant was convicted of both counts. The defendants were sentenced to concurrent terms. Their separate appeals were consolidated.

Appellants challenge the sufficiency of the evidence sustaining their convictions and contend that a voice identification of Ramsey violated due process, that a chemist's testimony was inadmissible because the evidence was tampered with, and that admission of Ramsey's California driver's license, issued under an alias, was "fruit of the poisonous tree." We find no merit in these contentions and affirm the convictions.

Appellants' convictions are based upon a series of drug transactions involving appellants and three other principle parties, Bruno, Williams, and Henderson. Bruno, a New York police officer working undercover, contacted Williams in New York with regard to the possibility of purchasing some heroin. Williams discussed the matter with Henderson who later called from Los Angeles to inform Williams that he had a contact who could supply the heroin. Williams flew to Los Angeles where he met Henderson and was taken to meet appellant Basey. Basey gave Williams a "free sample" of brown rock heroin and said she could supply whatever Williams needed. Later, Williams gave Henderson $10,000 to buy some heroin from Basey. Henderson made the purchase. Basey, Henderson, and Williams then met at a restaurant to toast their new venture. Williams mixed the sample Basey had given him with an equal amount of the purchased heroin, returned to New York, and gave Officer Bruno the mixture.

Thereafter, Williams twice traveled to Los Angeles and

made similar purchases. On both occasions, he met Henderson in the latter's apartment. Henderson would call Basey, take Williams' money, and return a few hours later with the drugs.

In February 1977, Bruno, in New York, negotiated with Henderson, in Los Angeles, for a large 1-1/2 kilo purchase. Henderson later told Bruno, in a call recorded by Bruno, that he had a contact for the heroin and would come to New York to close the deal. Williams met Henderson at the airport and they both met with Bruno. Henderson told Williams that he had met Basey's connection so he would no longer have to make purchases through her. The three negotiated an additional purchase. On March 9, 1977, while in New York to deliver 1/2 kilo of heroin to Bruno, Henderson was arrested. He agreed to cooperate with the government and to record future telephone conversations with his heroin source. The next day, Henderson called his source, appellant Ramsey. Henderson told Ramsey that he and Bruno would come to Los Angeles to close the large 1-1/2 kilo deal which was still pending. Bruno was introduced to Ramsey over the phone and Ramsey identified himself by his nickname, "Snake." Bruno and Henderson together with other federal agents, returned to Los Angeles. After some negotiations with Ramsey, the big deal fell through and Ramsey was arrested.

Appellants first challenge the sufficiency of the evidence, Ramsey as to Count I and Basey as to both counts. In examining the evidence, the standard we must apply is whether there is substantial evidence, taken in the light most favorable to the government, supporting the convictions. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Ramsey attacks the sufficiency of the evidence on two principle grounds. First, he contends that there was insufficient evidence identifying him as the individual named "Snake" who was Henderson's source and who participated in several recorded telephone negotiations with Henderson and Bruno. A number of witnesses testified that Ramsey was known as "Snake." A DEA agent identified Ramsey's voice from the recorded conversations. The government also introduced telephone registers indicating increased telephone activity between Ramsey, Basey and Henderson during the time of the sales. Voice identification may be accomplished by direct or circumstantial evidence. *United States v. Turner,* 528 F.2d 143, 163 (9th Cir.), *cert. denied,* 423 U.S. 996 (1975) and 429 U.S. 837 (1976). We find that there was sufficient evidence establishing Ramsey's identity.

Second, Ramsey asserts that the trial judge erred by receiving evidence of Ramsey's participation in the conspiracy before Ramsey's identification was established. The order in which this evidence comes in, subject to a motion to strike, is well within the trial court's discretion. Its exercise of that discretion will only be reversed in the event of clear abuse. *United States v. Weiner,* 578 F.2d 757, 768 (9th Cir.), *cert. denied,* 439 U.S. 981 (1978). There was no abuse of discretion in this case. Ramsey's challenge to the sufficiency of the evidence is without merit.

In challenging the sufficiency of the evidence supporting her convictions, Basey first asserts that there was nothing other than co-conspirator testimony to prove that she was a part of the conspiracy. The government, however,

supported co-conspirator testimony of her participation with evidence of increased telephone activity during the time of the various sales,[1] and with evidence of her conversation with Williams during which they discussed future transactions which did eventually take place. In addition, this court has held that even uncorroborated accomplice testimony is "sufficient evidence upon which to base a conviction if the testimony is not incredible or unsubstantial on its face." *United States v. Sigal,* 572 F.2d 1320, 1324 (9th Cir. 1978). There was substantial evidence to support Basey's conviction of Count I.

Basey challenges her conviction of Count II on the ground that there was no evidence of her continued involvement in the conspiracy on March 9, 1977, when the transaction upon which that charge is based occurred. Under the concurrent sentence doctrine of *Benton v. Maryland,* 395 U.S. 784, 791 (1969), which this court follows, *see United States v. Walls,* 577 F.2d 690, 699 (9th Cir.), *cert. denied,* 439 U.S. 893 (1978), we need not reach appellant's arguments on this count if her conviction of the first count is valid. Basey, however, can be convicted of the substantive acts of her co-conspirators whether or not she directly participates in those acts. *United States v. Testa,* 548 F.2d 847, 855 (9th Cir. 1977). Her participation in the

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[1] We find no error in the admission of Basey's college records to establish her address. A sufficient custodian testified that the records were made and kept in the regular course of college business. It is unimportant under Fed. R. Evid. 803(6) that the custodian did not herself record the information or know who recorded the information. See e.g., United States v. Reese, 568 F.2d 1246, 1252 (6th Cir. 1977); United States v. Jones, 554 F.2d 251, 252 (5th Cir.), cert. denied, 434 U.S. 866 (1977). In this case, the "person with knowledge" required by the rule would, of course, be Basey herself. No double hearsay problem arises, therefore, as admissions and adoptive admissions are not hearsay under Fed. R. Evid. 801(d)(2). The trial court did not abuse its discretion by admitting the records.

conspiracy is presumed to continue until the last overt act of the conspirators unless she produces affirmative evidence of withdrawal. *United States v. Panebianco,* 543 F.2d 447, 453 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977). Basey produced no such affirmative evidence. Consequently, her conviction of Count II was proper in any event.

Ramsey next contends that the procedure leading to DEA agent Smith's voice identification of him was so impermissibly suggestive as to violate due process. Use of agent Smith's testimony became necessary when testimony from other potential identification witnesses was suppressed shortly before trial. In addition, although somewhat suggestive,[2] the identification procedure employed was not so suggestive that "the mental image derived from the identification procedure supplant[ed] that derived from the witness's own experience." *United States v. Kim,* 577 F.2d 473, 483 (9th Cir. 1978), *quoting United States v. Pheaster,* 544 F.2d 353, 370-71 (9th Cir. 1976), *cert. denied,* 429 U.S. 1099 (1977). Thus the requirements of voice identification were met. *See United States v. Pheaster, supra* at 369-71.[3]

[2]Agent Smith was asked to listen to tapes and identify any voices he heard. He was not asked if he knew Ramsey before he heard the tapes or if he could identify Ramsey's voice. In this regard, the situation conforms with the recommendations of this court in United States v. Pheaster, 544 F.2d 353, 370 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977). He was aware, however, that the tapes he was listening to were to be evidence in the Ramsey and Basey trial and that it was likely that one of the defendant's voices would be on the tapes. He also knew that "Snake," a name used on the tapes, was a nickname for Ramsey.

[3]Ramsey contends that agent Smith's testimony was impeached during cross examination, thereby demonstrating the unreliability of his identification. Smith, however, testified that he had several conversations with Ramsey including one lasting 30 minutes when Ramsey was arraigned just seven months prior to trial. He testified that he was able to recognize Ramsey's voice after listening to the tape for only 15 to 20 seconds. He also testified as to several characteristics of Ramsey's voice which he noticed in making his identification. He listened to additional tapes and identified one of the conversants as Ramsey. Thus, there was substantial evidence from which the district court could conclude that Smith's identification was reliable.

Both appellants assign error to the admission into evidence of a stipulated chemist's report. The report concluded that the substance given to Williams by Basey as a "sample," and subsequently delivered to Officer Bruno, was heroin. Williams testified that he mixed the sample with an equal amount of a substance purchased from Basey with Henderson serving as an intermediary. Appellants contend that this mixing resulted in an alteration of the evidence in violation of the rule of *United States v. Godoy,* 528 F.2d 281 (9th Cir. 1975), and *Gallego v. United States,* 276 F.2d 914 (9th Cir. 1960). Appellants' reliance upon these cases is misplaced. *Godoy* and *Gallego* require that the government prove no alteration or tampering with the evidence *after* the government obtains custody of it. Any alteration which occurred in this case was done by a co-conspirator before the government obtained custody. The district court did not abuse its discretion by admitting the evidence.

Finally, Ramsey contends that the government should not have been permitted to introduce his driver's license on the ground that it was "fruit of the poisonous tree."[4] Prior to trial, all evidence resulting from Ramsey's arrest and subsequent search, including his driver's license, was suppressed. Thereafter, the prosecutor subpoenaed a copy of Ramsey's license from the California Department of Motor Vehicles, which was introduced at trial as identifica-

[4]Ramsey also objects to admission of the license on relevancy grounds. The license was issued in the name of "Charles Stein," had Ramsey's picture, and was dated three months after the end of the conspiracy. Ramsey contends that the license reflected current facts only, not facts existing during the conspiracy. The license, however, was submitted on the issue of identification and was clearly relevant to demonstrate Ramsey's use of the alias "Charles Stein." Admission into evidence was not an abuse of the district court's discretion.

tion evidence.

As this court stated in *United States v. Brock,* 571 F.2d 480, 483 (9th Cir. 1978), "information obtained through an unconstitutional search does not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . . ' *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920)." In response to inquiries by the district court, the Assistant U. S. Attorney stated that the license was obtained through normal investigative techniques and that all information necessary to subpoena it was known prior to the illegal search and seizure. Therefore, we hold that the license was not suppressable as "fruit of the poisonous tree."[5]

The convictions of both appellants were supported by substantial evidence on both counts. The district court committed no error by admitting into evidence agent Smith's voice identification of appellant Ramsey, the chemist's report, or appellant Ramsey's driver's license. The convictions are AFFIRMED.

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[5]Ramsey now questions the district court's failure to hold a hearing on the issue of independent source. However, he requested no hearing below, and the government's representations that the source was independent were never questioned.

ORDER DENYING REHEARING AND SUGGESTION FOR REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. J. C. RAMSEY, Defendant-Appellant.

No. 78-1203.

[Filed March 10, 1980]

Before: ELY and TRASK, Circuit Judges, and EAST,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and recommends the rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable William G. East, Senior United States District Judge, for the District of Oregon, sitting by designation.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MARCH , 1980, I served the within PETITION FOR WRIT OF CERTIORARI (BASEY vs. UNTIED STATES OF AMERICA) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
312 North Spring Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH , 1980, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Orig. & 40 copies to SUPREME COURT OF UNITED STATES via EXPRESS MAIL - DOCKET FEE ATTACHED TO ORIGINAL COPY.

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161